

Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

PHILIP R. SKODINSKI
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FRANCISCO ORTIZ,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 71A03-0606-CR-252
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0407-FB-100

March 13, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, Francisco Ortiz appeals his conviction for Class B felony rape.¹ Ortiz raises the following issues on appeal:

- I. Whether the trial court improperly excluded evidence of the victim's inconsistent statements regarding her prior sexual conduct; and
- II. Whether the trial court improperly excluded a police investigation report containing the officer's summary of Ortiz's statements.

We affirm.

FACTS AND PROCEDURAL HISTORY

On February 1, 2004, Ortiz hosted a party at his apartment to which he invited many coworkers from the Smokey Bones Restaurant in Mishawaka. During the party, Ortiz raped an eighteen-year-old coworker, L.R. Following the rape, L.R. told several guests what happened and was taken by two of them to the hospital. While at the hospital, L.R. reported the rape to police, which prompted a rape examination. As part of the examination, a nurse asked L.R. when she last had sexual intercourse. At a subsequent deposition, L.R. provided an inconsistent answer to the same question, when over the State's objection, she admitted she had previously lied to the nurse because she was embarrassed to answer honestly in front of her mother.

After being informed of L.R.'s accusations against him, Ortiz repeatedly called the police station to speak with the detective in charge of the investigation. Ortiz left messages informing the detective where he lived and that he would be home and available for the detective to come speak with him. When Mishawaka Police Detective Sergeant Cynthia Kilgore arrived at his home, Ortiz accompanied her back to the station

¹ See IC 35-42-4-1.

and gave a statement. Ortiz claimed he and L.R. engaged in consensual oral sex at the party, but denied that he raped her or that sexual intercourse occurred at all.

At trial, Ortiz sought to introduce evidence of L.R.'s inconsistent answers regarding when she last had sexual intercourse to undermine her credibility. After a hearing, the trial court excluded the evidence of L.R.'s statements as inadmissible evidence of past sexual conduct under the Rape Shield Rule, Indiana Evidence Rule 412.

Ortiz also sought to have the investigation report admitted into evidence at trial. The report contained summaries of Ortiz's statements to Detective Kilgore, as well as a notation regarding his efforts to initiate contact with the detective. After extensive argument by the parties, the trial court excluded the investigation report on the basis that it contained inadmissible hearsay statements.

At the conclusion of the trial, a jury found Ortiz guilty of Class B felony rape. Ortiz now appeals challenging the trial court's exclusion of the evidence of L.R.'s prior inconsistent statements regarding her sexual history and the police investigation report.

DISCUSSION AND DECISION

I. Evidence of Inconsistent Statements

Ortiz argues that the trial court abused its discretion when it ruled that evidence of L.R.'s prior inconsistent statements was inadmissible. Ortiz challenges the trial court's discretion by characterizing L.R.'s inconsistent statements as verbal conduct and analogizing them to the recognized exception for prior false accusations. He contends that the intended proffer focuses on L.R.'s inconsistent statements, her verbal conduct

of lying in the past, and not her prior sexual conduct. He further claims that, as the complaining witness, L.R.'s credibility is central to his conviction and prohibiting him from inquiring into her inconsistent statements violates his Sixth Amendment right to confront his accuser.

Admission or exclusion of evidence is within the discretion of the trial court and will only be reviewed on appeal for an abuse of discretion. *Wilson v. State*, 780 N.E.2d 1265, 1272 (Ind. 2002). Indiana Evidence Rule 412(a) states, in pertinent part, "in a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted...." Ind. Evidence Rule 412(a). The rule contains four specific exceptions, which both parties agree do not apply in this case. Courts, however, have recognized an additional exception to this rule, which permits evidence of prior false accusations of sexual misconduct made by the complaining witness when that evidence is offered to impeach the complaining witness. *Hook v. State*, 705 N.E.2d 219, 221 (Ind. Ct. App. 1999). This exception is based on the premise that "such evidence is more properly understood as verbal conduct, not sexual conduct." *State v. Walton*, 715 N.E.2d 824, 826-27 (Ind. 1999).

In *Jackson v. State*, 540 N.E.2d 1232 (Ind. 1989), the defendant sought to introduce evidence that the complaining witness had sexual intercourse in her home the day prior to the alleged rape. *Id.* at 1235. The defendant argued that the evidence was necessary to impeach the witness's previous testimony that she had spent the day prior to the rape at home cleaning. *Id.* Our Supreme Court held that despite its relevancy for impeachment purposes, it was direct evidence of past sexual conduct and therefore

properly excluded. *Id.* Here too, despite some tendency to impeach the witness's credibility, the inconsistent statements Ortiz seeks to introduce involve direct evidence of prior sexual conduct and do not fit the narrow exception for prior false accusations. The trial court's ruling excluding the evidence was proper.

Ortiz also argues that the trial court's ruling denied him his Sixth Amendment right to confront the witness. However, Indiana's Rape Shield Law has been found to be constitutional. *Thomas v. State*, 471 N.E.2d 677, 679 (Ind. 1984). Exclusion of evidence under the Rape Shield Law does not violate a defendant's Sixth Amendment rights "absent a showing of actual impingement on cross-examination." *Id.* Ortiz has made no such showing; therefore, his Sixth Amendment rights have not been violated.

II. Police Investigation Report

Ortiz argues that Detective Kilgore's investigation report, which memorialized his version of the events, should have been admitted into evidence. Specifically, Ortiz wanted to introduce the portion of the investigation report that contained summaries by Detective Kilgore of Ortiz's statements concerning consensual sexual activity that occurred between L.R. and himself. Ortiz contends that this evidence was necessary to rebut the testimony of previous witnesses who claimed Ortiz told them nothing happened with L.R.

When considering the admission of a hearsay statement within a hearsay statement, each part of the combined statement must be independently admissible under an exception to the hearsay rule. Ind. Evidence Rule 805. Therefore, Ortiz must show that each portion – the investigation report and his statements to Detective Kilgore – fits

within an exception to the hearsay rule. When offered by the accused in a criminal case, police investigative reports fit within the exception for public records and reports contained in Indiana Evidence Rule 803(8)(a). *Hardiman v. State*, 726 N.E.2d 1201, 1204 (Ind. 2000). Therefore, Ortiz may admit the report itself into evidence; however, the specific statements summarized within the report must be independently admissible.

At trial, Ortiz sought to have his statements entered under Indiana Evidence Rule 801(d)(2) which excludes from the definition of hearsay a party's own statements when offered against him, i.e. a statement by a party opponent. Ind. Evidence Rule 801(d)(2)(A). The trial judge ruled the evidence inadmissible under 801(d)(2)(A) because the investigation report contained summaries of his own out-of-court statements, not those of his opponent. On appeal, Ortiz does not challenge the trial court's application of the rule, but instead argues the fundamental inequity of prohibiting the defendant from bringing into evidence his own statements, which, if brought by the State, would be admissible.

Generally, hearsay is excluded due to uncertainty regarding the reliability of the information contained in such statements. The reliability cannot be adequately tested without the declarant being available to testify in court, under oath, and subject to cross-examination. *Wells v. State*, 261 N.E.2d 865, 869 (Ind. 1970). It is a natural consequence of our adversarial system that litigants be allowed to hold opponents to account for their own statements. Fed. R. Evid. 801 advisory committee's note. "[T]he hearsay rule was not intended to protect a party from having to face and perhaps explain their own out-of-court statements." *Sharp v. State*, 534 N.E.2d 708, 711 (Ind. 1989). A

party, in an effort to bolster his credibility with the jury, may not introduce his own out-of-court statements, without subjecting himself to cross examination. *Canaan v. State*, 541 N.E.2d 894, 904 (Ind. 1989). In the case of his own statement introduced by an opponent, a party may testify to clarify any mistake, misperception, or other circumstance affecting its truth or reliability; and, of course, the party is not denied the right to confront the witness against him, since the out-of-court statements are his own. *Jethroe v. State*, 319 N.E.2d 133, 138 (Ind. 1974).

Detective Kilgore's summary of Ortiz's statements contained within the investigation report is inadmissible hearsay. As such, the trial court properly excluded that portion of the investigation report.

Affirmed.

RILEY, J., and FRIEDLANDER, J., concur.